FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

From: Luisa Menchaca, General Counsel
Scott Tocher, Staff Counsel, Legal Division

Re: *In re Olson* (O-01-112) Opinion Request Concerning the Campaign Reporting Obligations of the California Democratic Party and the California Republican Party Under Government Code sections 81009.5 and 85312.

Date: May 25, 2001

I. Introduction

Counsel for the California Democratic Party, Lance Olson, has submitted an opinion request on behalf of the California Democratic Party ("CDP"). The California Republican Party ("CRP") has joined in on the request. (Attachment A includes the written requests.) The Executive Director granted the request on May 21, 2001. (Government Code section 83114(a); [1] Regulation 18320.) The request is set for its first hearing on June 8, 2001. (Regulation 18322.) This memorandum discusses the issues raised by this request.

II. Question

Pursuant to Government Code sections 81009.5 and 85312, are the California Democratic Party and the California Republican Party, statewide general purpose committees, subject to the "additional or different" filing requirements of Los Angeles City Ordinances Nos. 173930 and 173929?

III. Summary of Staff's Conclusion

These statewide general purpose committees are not subject to the filing requirements as they pertain to payments for member communications not resulting from contributions received from third parties for the purpose of supporting or opposing a candidate or a ballot measure. If the filing requirements are not imposed on the state political parties by the City of Los Angeles Ethics Commission, there is no conflict with state law.

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[1] All references are to the Government Code unless otherwise noted.

IV. Background – Facts

On May 4, 2001, the Los Angeles City Council adopted two emergency ordinances establishing additional notification, disclosure and filing requirements for payments made by organizations to communicate the organization's support of or opposition to City candidates to their members. The city council has directed its staff to take the necessary steps to have them adopted as permanent ordinances.

The ordinances (Attachment B), in pertinent part, provide the following:

1. Ordinance 173930 requires any committee that made more than $10,000 in member communications to file a report with the Los Angeles Ethics Commission containing "all information required by California Government Code section 84211" and including all contributions received between January 1, 2001 and April 10, 2001, in support of or opposition to candidates for elective City office.

The report for January 1 through April 10 was due within 14 days of the effective date, i.e., May 22, 2001. For purposes of this notification, payments by an organization for its regularly published newsletter or periodical, for circulation to its members, are not required to be reported.

2. Ordinance 173929 requires any person who makes or incurs payments of more than $1,000 for member communications to notify the Los Angeles City Ethics Commission by fax, e-mail or telegram within 24 hours each time such payment is made or incurred. This requirement is effective immediately. This ordinance also provides for a similar exemption for regularly published newsletters.

Ordinance 173929 also requires each person who made or incurred payments of more than $1,000 for member communications between April 11, 2001 and the effective date of the ordinance to notify the Los Angeles Ethics Commission within 72 hours of the effective date. The 24 hour and 72 hour notices must contain specific information about the payor, the payee and the candidate supported or opposed. The CDP understands that the 72 hour notice was due May 11, 2001.

In addition, any person making payments of more than $10,000 after the effective date of the Ordinance 173929 must also file a campaign report seven days before the election which contains "all information required by California Government Code section 84211 and shall report all contributions received on or after the effective date of this ordinance, and all expenditures or payments within the meaning of California Government Code section 85312 made or incurred on or after the effective date of this ordinance, in support of or opposition to candidates for elective City office."

The CDP states in its May 15, 2001 opinion request, "The ordinances reach far beyond the Ethics Commission's well-understood authority to regulate city candidates and committees and attempt to embrace all 'persons' making any 'payments'

communicating with their members, including statewide political committees such as CDP."

CDP further states that the City of Los Angeles has interpreted its restrictions on contributions to independent expenditure committees as applying only to city general purpose committees or committees formed primarily to support or oppose a specific city candidate. (*Olson* Advice Letter, CEC No. 2000-13.)

The CRP added in its letter dated May 17, 2001, that the additional disclosures specify different timetables and different disclosures than required of general purpose committees by the Political Reform Act. The CRP shares the concern of the CDP that "it may become subject to multiple, duplicative, and often different or inconsistent reporting and disclosure requirements imposed by other charter cities in their efforts to regulate constitutionally-protected and state-regulated 'member communications' should the California Republican Party attempt to exercise its constitutional rights of association and speech by communicating its views and positions on issues and candidates for local elective offices in such jurisdictions."

V. Summary of the Law

Section 81013 provides that nothing in the Political Reform Act ("Act") prevents a local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with the Act. This section addresses generally the authority of local agencies to impose obligations beyond those set forth in the Act and makes clear that the Act is not intended to so occupy the field it regulates that state and local government agencies are powerless to enact additional regulations. (*In re Alperin*, 3 FPPC Ops. 77.)

However, the authority granted to local agencies is significantly limited by Section 81009.5(b) which prohibits a local government agency from enacting any ordinance imposing filing requirements "additional or different" from those set forth in chapter 4 of the Act for elections held in the local agency's jurisdiction, unless the additional or different filing requirements apply only to:

> …the candidates seeking election in that jurisdiction, their controlled committees or committees formed or existing primarily to support or oppose their candidacies, and to committees formed or existing primarily to support or oppose a candidate or to support or oppose the qualification of, or passage of, a local ballot measure which is being voted on only in that jurisdiction, and to city or county general purpose committees active only in that city or county, respectively.

This provision allows local jurisdictions some flexibility to require additional or different filing requirements for local elections. Proposition 34 appears to endorse this theme by adding section 85703. It provides:

> Nothing in this act shall nullify contribution limitations or prohibitions of any local jurisdiction that apply to elections for local elective office, except that these limitations and prohibitions may not conflict with the provisions of Section 85312.

Section 85312, in turn, provides:

> For purpose of this title, payments for communications for purpose of this title to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or independent expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements.

In January 2001, the Commission adopted emergency regulation 18573 which provided in subdivision (b), "Notwithstanding Government Code section 81009.5, a local government agency may not require reporting prohibited by Government Code section 85312."[2]

VI. Discussion

A. Filing Requirements of Statewide General Purpose Committees Under the Act.

The California Democratic Party and the California Republican Party are "state filers" under Chapter 4 of the Act. This means they file as state general purpose committees for purposes of the disclosure and reporting requirements of the Act. The parties have been involved in member communications within the City of Los Angeles in recent candidate elections.

Under the Act, payments made for those communications are reported as expenditures on the parties' regularly-fixed state reports which are due semi-annually. For example, for the first six months of this calendar year, the first report is due July 31, 2001, for the reporting period of January-June of 2001. (Section 84200.) Also, if the party committee were to make contributions totaling $10,000 or more in connection with an election, the committee would have to file a supplemental pre-election statement with the Secretary of State's office no later than 12 days before the election, for the period

[2] The emergency regulation was in effect until May 22, 2001.

ending 17 days before the election . (Section 84202.5.) The Form 460 on which the semi-annual reports are filed is being amended to, among other things, include the code "MBR" to identify payments made for membership communications.

Current law does not, however, require the parties to identify which candidates or measures were discussed in any particular membership communication because these payments are not considered contributions or independent expenditures. In short, the payments are not considered to be, and therefore, are not reported as, either contributions to the candidates or independent expenditures made on behalf of the candidates. (Section 85312.)

The new ordinances are subject to section 81009.5. Ordinance 173930 requires a report to be filed with the Los Angeles City Ethics Commission so it clearly is within the purview of this section. The notifications required by Ordinance 173929 are also filings since such notifications must be made to the Los Angeles City Ethics Commission.

The notifications or filings imposed by the new Los Angeles ordinances are not currently required by the Political Reform Act ("Act") and its implementing regulations. Therefore, the new filings are considered either additional or different filing requirements within the meaning of section 81009.5.

This conclusion is stated in emergency regulation 18573. (Attachment C.) The language of subdivision (b) of the regulation provides that a local government agency may not require reporting *prohibited* by Government Code section 85312. The regulation's COMMENT states, "The statutory expiration of this emergency regulation shall not be construed to indicate that the above-entitled statutes are no longer applicable to local candidates, committees or jurisdictions." Two of those statutes include sections 85703 and 85312.

Section 85312, referenced in regulation 18573, affected the reporting requirements of persons with reporting and disclosure obligations under the Act, including the CDP and the CRP. For example, prior to January 1, 2001, except for

specified exceptions,[3] payments for the purpose of supporting or opposing a candidate or ballot measure were reportable as either "contributions" or "independent expenditures." (Sections 82015, 82031.) Now they are reportable as ordinary expenditures. As ordinary expenditures, only the total amount of expenditures made during a reporting period covered by a campaign statement and the total cumulative amount of expenditures is reported. (Section 84211(b).) Subdivision (k) of section 84211 requires the names and address of each person to whom an expenditure of $100 or more has been made during the period covered by the campaign statement. With respect to payments for communications, this would cover the printer or vendor used to send the communication. The candidate or committee which was the subject of the communication would only be identified now if the expenditure qualified as a "contribution" or "independent expenditure", which membership communications do not. (Section 84211(k)(5).

Since section 85312 provides that member communications are neither "contributions" nor "independent expenditures," the parties cannot be required to report them as such under Chapter 4. However, the Los Angeles ordinances do just that. This is because the ordinances require the membership communications payments to be reported as though they were contributions to specific candidates, i.e., in support of or in opposition to candidates. Specifically, the ordinances require "**all** the information required by California Government Code section 84211," including, for example, the name of the candidate identified in the membership communications pursuant to section

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[3] Pursuant to Commission regulations, certain member communications were neither "contributions," "independent expenditures," or "expenditures." (Regulations 18215, 18225.) These include member communications included in newsletters and periodicals.

Regulation 18215(c)(9) provides the term "contribution" does not include, "A payment by an organization for its regularly published newsletter or periodical, if the circulation is limited to the organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication. This exception applies only to the costs regularly incurred in publication and distribution. Any additional costs incurred are contributions, including, but not limited to, expanded circulation; substantial alterations in size, style, or format; or a change in publication schedule, such as a special edition."

Also, Regulation 18225(b)(4) provides:

"Notwithstanding the provisions of this subsection, the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:

(A) A regularly published newspaper, magazine or other periodical of general circulation which routinely carries news, articles and commentary of general interest.

(B) A federally regulated broadcast outlet.

(C) A regularly published newsletter or regularly published periodical, other than those specified in paragraph (b)(4)(A), whose circulation is limited to an organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication. This paragraph applies only to the costs regularly incurred in publishing and distributing the newsletter or periodical. If additional costs are incurred because the newsletter or periodical is issued on other than its regular schedule, expanded in circulation, or substantially altered in style, size or format, the additional costs are expenditures."

84211(k)(5). By requiring "payments" to be reported that otherwise are currently excluded from any reporting required by the Commission, the local ordinances require reporting that is "additional or different" than required by the Act.

The Commission staff has interpreted section 81009.5 to restrict local ordinances to activities regulating local candidates or measures, or to committees active only in the jurisdiction adopting the ordinance. (For example, see the *Moll* Advice Letter, No. A-96-315.) The staff believes the language of the statute speaks for itself. The statute specifically limits the additional or different disclosure to apply to city or county general purpose committees active only in that city or county. Therefore, a statewide general purpose committee, active outside of the City of Los Angeles, is not bound by "additional" or "different" reporting requirements of this or another local jurisdiction. By referencing section 81013, section 81009.5 limits what local jurisdictions may require to be reported.

In summary, since member communications by organizations, as defined in section 85312, are not now considered contributions or independent expenditures under the Act under the PRA, such payments do not result in pre-election reporting, nor is a particular payment required to be attributed to a particular candidate. Such payments are reportable as "expenditures" but the particular candidate or ballot measure on whose behalf the payment is made is not reported. (Section 84211.)[4]

Therefore, staff would agree with the CDP's assertion that the Los Angeles City ordinances indirectly treat member communications like contributions or independent expenditures the way they were treated before section 85312 was adopted and that such regulation conflicts with the Commission's current interpretation of section 85312, as expressed in emergency regulation 18573(b).[5]

The staff is not prepared to conclude, however, that the portion of the ordinances that provides that contributions "received" in support of or opposition to candidates for elective city office are "additional to or different" from the Act's requirements. Section 85312 provides that payments for communications for the purpose of supporting a candidate or a ballot measure are not contributions. Whether this refers to a person who earmarks a payment for a specific candidate or measure, or whether that language refers to the party's payment for the communication is an issue the staff plans to bring to the Commission for consideration. If the Commission were to conclude that the exception

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[4] SB 34 (Burton), as amended May 17, 2001, deletes this reporting requirement. However, the amendment also adds reporting by political parties of contributions and expenditures.

[5] In reaching this conclusion, staff is not addressing whether similar regulations may or may not be adopted by the Commission in the future to implement the provisions of section 85312. The staff is currently examining how section 85312 may be interpreted and is expected to present regulatory language for the Commission to consider later this year, For example, in our letter dated May 10, 2001 indicating that the CDP should request a Commission opinion to address these issues, the staff indicated that our preliminary analysis under regulation 18573 was that the regulation prohibits the reporting obligations imposed on CDP by the ordinances enacted by the City of Los Angeles.

applies only when the parties "make" a member communication payment, it is possible that contributions "received" from third parties may still be reportable.

B. Conflicts With State Law.

Counsel for the CDP argues that the Los Angeles ordinances conflict with section 85312 by explicitly requiring reporting that section 85312 says is not reportable. If the Commission agrees with the CDP, due to the broad implications this request may have on the City and other local jurisdictions' ability to amend local ordinances, the remaining part of the memo analyzes whether a conflict may exist under a preemption analysis. The question of preemption of a local ordinance by a state law is a constitutional one:

> When the local matter under review "implicates a municipal affair and poses a genuine conflict with state law, the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted. If the subject of the statute fails to qualify as one of statewide concern, then the conflicting charter city measure is a municipal affair and beyond the reach of legislative enactment. … If, however, the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related and narrowly tailored to its resolution, then the conflicting charter city measure ceases to be a municipal affair pro tanto and the Legislature is not prohibited by article XI, section 5, subdivision (a), from addressing the statewide dimension by its own tailored enactments." (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399, quoting *CalFed Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17; internal quotations and brackets eliminated.)

Care should be taken not to assume a conflict between competing laws exists. Rather, such a conclusion should be avoided. Only when a conclusion that a conflict exists is unavoidable should the constitutional analysis of determining which law prevails be employed.

The threshold inquiry here is whether there is a conflict between the two sets of laws. If, as it appears, the laws are, in fact, in conflict, then the Commission must embark on a constitutional evaluation of the laws to determine whether it operates to preempt the local ordinances. If the Commission concludes that the statute is *not* one of statewide concern, or that the law is not "reasonably related and narrowly tailored" to resolving that interest, then the Commission would conclude that the law does not pass

constitutional muster and cannot preempt the contrary ordinances. In other words, the Commission would conclude that the statute is unconstitutional as applied to Los Angeles.[6]

In the instant case, the following analytical steps must be taken:

STEP 1. DETERMINE WHETHER THERE IS AN *ACTUAL CONFLICT* BETWEEN GENERAL STATE LAW AND CHARTER CITY LAW.

Assure that the matter implicates a "municipal affair" and poses a genuine conflict with state law. A court is cautioned to avoid unnecessarily finding a conflict and entertaining substantive municipal affairs questions.

STEP 2. DOES THE CONFLICTING STATE LAW QUALIFY AS A MATTER OF STATEWIDE CONCERN?

If not, then the conflicting city measure is a municipal affair and beyond the reach of the state law.

If so, go to Step 3.

STEP 3. IS THE STATE STATUTE REASONABLY RELATED TO THE RESOLUTION OF THAT CONCERN AND NARROWLY TAILORED TO LIMIT INTRUSION ON MUNICIPAL INTERESTS?

If so, then the Legislature is not prohibited by the California Constitution from addressing the statewide dimension by its own tailored enactments.

The discussion below follows the headings and analysis as indicated above.

Step 1. Actual Conflict Facts and Procedure.

For an actual conflict to exist, the purported conflict must a genuine one, unresolvable short of choosing between one enactment and the other. (*CalFed*, *supra*, at 17.) The matter must also implicate a "municipal affair."

There is no question that a matter within the ambit of a "municipal affair" is involved here as the parties' activities involve express advocacy of candidates or

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[6] If the Commission agrees with the requestor that section 85312 preempts the local ordinances, Article III, section 3.5, which prevents even the mere declaration that a statute is unconstitutional, is not implicated because the Commission would not "declare a statute unenforceable" or "unconstitutional." (Art. III, § 3.5, subds. (a) and (b).) The concern here is that if a Commission opinion concludes that a state statute is unconstitutional, it is effectively the same as a "declaration" that a statute is unconstitutional. Article III, however, does not prevent the Commission from evaluating whether section 85312 may be interpreted consistent with Article XI, section 5, the "home rule" provision. (*Regents of the University of Cal. v. Public Employment Relations Board, et al.* (1983) 139 Cal.App.3d 1037.)

measures in a City of Los Angeles election. If the Commission agrees with the staff analysis, a finding of actual conflict here can be made. However, as noted, it is unclear whether the City would agree with this analysis.

Step 2. Does the state statute implicate a statewide concern?

The first rule about this step is that it is not to be applied mechanically. "In performing that constitutional task, courts avoid the error of 'compartmentalization,' that is, of cordoning off an entire area of governmental activity as either a 'municipal affair' or one of statewide concern." (*Id.,* at p. 17.) From a practical standpoint, there is no such thing as an area of law being "off limits" to either the state or local government:

> When a court invalidates a charter city measure in favor of a conflicting state statute, the result does not necessarily rest on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city. (*Id.,* at p. 18.)

The notion of "statewide concern" is addressed in the *CalFed* case. In *CalFed*, the record established a history of treatment of the issue of financial corporate entities as a matter of state concern. (*Id*, at pp. 19-20.) Much of the opinion set out the long history of federal and state regulatory schemes and focused on then-recent changes in those schemes to address the faltering savings and loan situation. Among measures proposed by a federal task force to deal with the insolvencies of the 80's was one to lift taxes on savings banks based on deposits. Finally, a consistent taxing scheme by the states assured predictable and identifiable costs for the banks. (*Id*., at pp. 19-23.) Because the "comprehensive regulation" of savings banks took place "almost entirely at state and federal levels," the tax policies "necessarily transcend local interests; they become, in other words, a subject of statewide concern." (*Id*., at p. 23.)

In this case, as in *CalFed*, there is a length history of state regulation of multi-jurisdiction committees. Since section 81009.5 was amended in 1985 (Stats. 1986, Ch. 1456), there has been an arm out against local regulation of state committees, which in the past, the City of Los Angeles has followed. As in *CalFed*, a comprehensive scheme located centrally in one body of law is a legitimate state goal where to do otherwise can cause confusion or undue burden on the object of regulation. In *CalFed*, that burden was on the savings and loans that would be susceptible to numerous expensive local taxes which were not necessarily based on profit. The specter of countless tax schemes threatened the system itself. In this case, staff agrees with the CDP's and the CRP's assertions that a similar fate would befall state committees. Commission staff has also advised consistent with this thinking. In the *Moll* Advice Letter, *supra*, we stated:

> The statewide concern at issue here is statewide uniformity of filing requirements imposed by state law on persons running statewide campaigns; more specifically, the concern is that a

> person running such a campaign may easily and logically determine where to file the reports and statements required by the Act. It seems self-evident that designating in state law a particular, easily identified person to receive the filings is reasonably related to that end.

Not surprisingly, then, section 81009.5 states an exception to the rule set out in section 81013, and does not allow additional or different filing requirements from those in chapter 4.

That there might be adverse consequences in a municipal election if the local ordinances fail also does not necessarily mean that there is not a sufficient statewide interest. In the *CalFed* case, the city lost millions in uncollectable tax revenues. Nevertheless, the question in that case was "not whether the amendment [of the law by the state] was prudent public policy…. This issue is whether the … burden on financial corporations… is of sufficient extramural dimension to support legislative measures reasonably related to its resolution." (*CalFed*., at pp. 23-24.) For the Court, it was enough that the record established substantial support for the legislative decision and that it was narrowly tailored to remedy that situation. (*Id*., at p. 24.)

In this case, the City of Los Angeles will lose some information it may wish to have. However, it is staff's view that the rest of the state benefits by uniformity and simplicity. Also, some of the information the City seeks to obtain is disclosed, although it may be after an election is held.

Step 3. Is the State Statute Reasonably Related to the Statewide Concern and Is the Statute Narrowly Tailored?

This step has not commanded extensive discussion in either the *Johnson* or *CalFed* opinions. To the extent the analysis here primarily concerns section 81009.5, it seems that by virtue of the statute's simplicity and clarity, there could not be a statute more narrowly tailored to the ends of statewide uniformity. The statute specifically concerns the reporting and disclosure rules of the Political Reform Act. Therefore, the staff views this element to be satisfied by the state law.

In summary, staff believes that to the extent an actual conflict exists between the Political Reform Act and the new City ordinances, the CDP and the CRP are subject only to reporting not implicated to the provisions of section 81009.5 and the Commission's interpretation of how that section interacts with section 85312.

Attachments

Attachment A, CDP letter dated May 15, 2001 and CRP letter dated May 17, 2001
Attachment B, Los Angeles City Ordinances 173930 and 173929
Attachment C, Emergency Regulation 18573